D. VAN EE, Agent for OOST AFRIKAANSCHE COMPAGNIE, a Dutch Firm Transacting Mercantile Business in Monrovia, Appellant, v. **SAMUEL B. GABBIDON**, Natural Guardian for his Minor Son, JOSHUA GABBIDON, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 2, 1951. Decided May 11, 1951.

1. An appeal bond is not fatally defective for having only one surety if the financial ability of the surety is not questioned and the appellee does not allege that he is insufficiently indemnified.

2. The surety of an appeal bond need not be a freeholder if he is liable to the ordinary process of the court and is able to pay the amount for which he became responsible.

3. A valid action should not be dismissed by a court of equity without a hearing on the merits.

Appellee instituted a proceeding in equity to cancel a lease agreement. The lower court decreed such cancellation, and appellant appealed to this Court. On motion by appellee to dismiss the appeal, on the ground that the appeal bond was defective: *Motion denied.*

Richard F. D. Smallwood for appellant. *Richard A. Henries* for appellee.

MR. JUSTICE DAVIS delivered the opinion of the Court.

When this case was called for hearing, Counsellor Richard Abrom Henries, representing the appellee, gave notice to this Court of the filing of a motion to dismiss the appeal. Opportunity was thereupon afforded the appellant, to file a resistance to said motion if he desired to do so. Accordingly, a resistance embodying three counts was filed, and we quote hereunder from the motion as well as from the resistance.

"MOTION TO DISMISS APPEAL.

"1.The purported appeal bond filed in this case is fatally defective in that the statute

controlling appeals definitely states that an appeal bond should carry two sureties, at least, who are householders or freeholders within the Republic of Liberia; but contrary to this statute, the appeal bond filed in this case does not carry the names of two sureties who are householders or freeholders within this Republic. Rev. Stat., sec. 426.

"2. The purported surety, D. Van Ee, not being a freeholder or householder within this Republic, should have, in keeping with the Act of Legislature approved February zo, 1940, made tender of the amount required as bail, in cash, checks, stocks or other negotiable securities capable of being readily converted into money; this he failed to do ; hence the appeal bond filed by appellants is fatally defective and should be dismissed.

"3. Appellee further submits that the appeal bond filed in this case is not only fatally defective, but is deceptive and calculated to mislead this Court, in that D. Van Ee, the purported lone surety, styles himself as a freeholder within the Republic of Liberia when indeed he is not a freeholder within this Republic, and never can be under our Constitution."

"RESISTANCE TO MOTION TO DISMISS APPEAL.

"1. Count '1' of said motion should not be sustained because said bond is not fatally defective. The ground set out for the dismissal of said appeal is that said bond is fatally defective. The principle upon which the appellee relies in Count `I' of said motion is that the bond should carry at least two sureties who are householders or freeholders within the Republic of Liberia. Appellant maintains that failure of the bond to carry two sureties, especially when the assets of one surety are far and above the amount named in said bond, is not a ground for the dismissal of an appeal under the Act of Legislature approved November 31, 1938. Appellant further maintains that he, as General Manager of the Oost Afrikaansche Compagnie in Liberia, has assets over and above the amount named in said bond, and that the appellee is covered for any damages he may sustain as a result of the failure of the appellant to prosecute said appeal.

"2. The point raised in Count '2' is a mere technicality and should not prevent an appellate court from hearing an appeal. This Court, in *Daniel v. Campania Transmediterranea,* 4 L.L.R. 97 (1934), settled the principle that a foreigner representing a foreign corporation with assets in Liberia can be surety in a cause pending before our courts.

"3. With reference to Count '3' appellant submits that said bond is not defective or calculated to mislead this Court because, as shown, *supra,* the word, `freeholder' is synonymous with the word 'householder,' since the definition of the word, 'freeholder,' in an estate, refers to the word 'tenement' ; and a 'tenement' is a house or homestead ; hence said word does not render defective said bond because appellant is a `freeholder.' Appellant further submits that this Court, sitting in equity, should not give heed to mere technicalities introduced to prevent this Court from going into the merits and settling vital issues and legal principles. Appellant further submits that said bond is not fatally defective, and the points set out in said motion are not statutory grounds upon which an appeal that has been regularly taken can be dismissed by this Court."

Reference to the statute cited by appellee in support of his contention respecting two or more sureties to an appeal bond discloses that there is such a provision in our statutes. However, subsequent to the passage of said statute, the Legislature, in an enactment passed and approved January 21, 1938, declared that this Court might grant a motion to dismiss an appeal only for the following causes : (1) failure to file an approved bill of exceptions; (2) failure to file an approved appeal bond, or fatal defectiveness of said bond ; (3) failure to pay cost of lower court; and (4) non-appearance of appellant. L. 1938, ch. III, sec. 1.

The question which now arises out of a comparative study of these two enactments is when, and under what circumstances, an appeal bond is fatally defective, since according to the latter and more recent enactment, only fatal defects can justify the dismissal of an appeal by this Court.

At this point the courts are called upon to exercise their constitutional power. In so doing they are, by law, enjoined not only to construe and interpret the relevant enactments, but are required to ascertain the intention of the lawmakers in passing said statutes. Accordingly, this Court has construed the intention of the Legislature as follows :

"It is true that, in *Deady v. Republic,* 8 L.L.R. 256 (1944), in discussing the motion we mentioned that, in appeals from the circuit court to the Supreme Court the statute provides for two or more sureties, but that reference was only incidentally made, and was not a holding of the Court. The only questions to be decided in that case were whether, in an appeal from a justice of the peace court to the circuit court the appeal bond was required to have two sureties thereon, and whether the said bond should

also show on its face that the sureties were householders or freeholders. But since in this case the issue has been raised, although imperfectly because of uncertainty and ambiguity, we shall now decide whether or not an appeal bond from the circuit court to the Supreme Court must now necessarily have two or more sureties.

"It is true that in the Revised Statutes, it is provided that 'every appellant shall give a bond in an amount to be fixed by the court with two or more sureties, who shall be householders or freeholders within the Republic.' 1 Rev. Stat. § 426. But since the passage of said act, the Legislature has seen fit to pass two other acts with reference to and controlling appeals and their dismissal.

"The act of 1938 limits the dismissal of appeals to four causes :

"1. Failure to file approved Bill of Exceptions.

"2. Failure to file an approved Appeal Bond or where said bond is fatally defective.

"3. Failure to pay cost of lower Court.

"4. Non-appearance of appellant.' L. 1938, ch. III, § 1.

"In the year 1940 the Legislature passed an act amending the law of bail in criminal, civil and appeal causes and made it possible legally for bail to be :

" 'given [either] by recognizance entered into by the principal and his sureties, who may be possessed of the qualifications required by existing statutes ; or by tender of the amount required as bail in cash, checks, stocks, or other negotiable securities capable of being readily converted into money, or by offer of unencumbered real property held in fee by the bailor.'

" 'Any bond given as provided for in this Act shall be considered a valid and legal bond, in any cause criminal, civil or appeal. . . .' L. 1939-40, ch. XVIII, §§ 1, 3.

"In the cases of *Johns v. Pelham,* and *Pelham v. Witherspoon,* 8 L.L.R. 296 (1944), decided together, the former involving ejectment and the latter objection to the probate of a deed, it was held, after citing the act of 1938:

" 'To all intents and purposes it is obvious that the intention of the Legislature in passing that act was to discourage the dismissal of appeals on technical legal grounds

and to give to appellants an opportunity to have their cases heard by this Court on their merits in order that substantial justice be done to all concerned . . *Id.* at 305.

"This view since that time has been consistently upheld and mentioned in several cases, e.g., *Firestone Plantations Co. v. Greaves,* 9 L.L.R. 147 (1946), involving a motion to dismiss in an action of damages for injury to personal property; *Cole v. Williams,* 10 L.L.R. 191 (1949), involving a motion to dismiss a bill in equity to quiet title.

"In the case *Buchanan v. Arrivets,* 9 L.L.R. (1945), involving breach of contract in interpreting the act of 1938 this Court declared :

" 'In our opinion the act of 1938 cited by appellant does not give us authority to correct an error such as a neglect to issue, serve, and return a notice of appeal by an order appropriate to give us jurisdiction over appellee after appellee has attacked the jurisdiction of the court by motion to dismiss the appeal. The causes so clearly stated in the act for which an appeal might be dismissed refer to cases in which jurisdiction is wanting. . . *Id.* at 22.

"Since the question at bar is one in which we already have jurisdiction and boils down to whether or not, under present modern views and under the acts of the Legislature referred to *supra,* the omission of one signature of a surety in an appeal bond which in all other respects is without fault should be considered a fatal defect, sufficient to warrant our dismissal of the appeal of appellants, we will now consider it from that angle :

"Cyclopedia of Law and Procedure states that:

" 'Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one ; and the statute would be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended. . . 36 *Id. 1110 (1910).*

" 'It is to be noted that the object of an appeal bond with sureties is to secure to the appellee his costs and to assure the court of compliance with its judgment. Nowhere in the motion filed by appellee does he attack the financial sufficiency of the surety to meet the requirements of the bond of one hundred dollars and for that reason demand more than one surety. He much evidently be satisfied with the sufficiency of

the financial status of the surety. That being so the defect cannot and will not be considered fatal by us so as to warrant our dismissal of the appeal.' " *Dennis v. Holder,* 10 L.L.R. 301, 304-307 (1950).

In the light of the decision quoted above, we are of the opinion that appellee's interest has not been prejudiced, nor is he likely to suffer any injury as a result of the bond having only one surety, particularly since, in his motion, he neither questions the financial ability of the one surety to meet the requirements stated and stipulated in the bond, nor alleges that he is insufficiently indemnified because the bond carries only one surety. Count "1," therefore, of appellee's motion does not receive the favorable consideration of this Court.

We shall now pass upon Counts "2" and "3" of the motion together. Count "2" sets forth that D. Van Ee, surety on said bond, is not a freeholder because he does not own property in fee simple, and as such he should have followed the statute of 1940 cited by appellee. In Count "3," appellee further stresses the point of D. Van Ee not being a freeholder, and of his incapacity to be one because of a constitutional prohibition.

While it is true that D. Van Ee is not a freeholder, it is also true that persons other than those owning real estate in fee simple can become sureties under certain conditions. For instance, corporations duly registered and operating in Liberia, owning property, although not real estate in fee, may be sureties. The Court in deciding who is qualified to stand bail, or to become surety to an appeal bond, laid down the following principle in *Manheiner v. Fuller, 1* L.L.R. 211 (1887) :

"Among the essential qualifications to enable one to become bail for another is that the bailee be liable to the ordinary process of the court and be able to pay the amount for which he became responsible."

Since appellee did not allege that D. Van Ee is not liable to the ordinary process of the court, or that he is not able to pay the sum set forth in the appeal bond, it follows that the financial sufficiency of the bond has not been attacked. In all appeal bonds in civil cases, financial sufficiency is the prevailing feature, because the sole objects of an appeal bond in such cases are indemnification of the successful party, and payment of costs. Therefore, it is our opinion that the attack upon the appeal bond is not sufficient to justify dismissal of the appeal. The appeal bond, in our opinion, is enforceable. This Court, in *Williams v. Johnson, 1* L.L.R. 247 (1893), and in *Smith v. Page,* 10 L.L.R. 104 (1950), has held that a bond which is sufficiently descriptive in its

construction to make its conditions clear and intelligible, and capable of enforcement, though lacking in other respects, is nevertheless legal.

In view of the foregoing, and because it is also the practice of this Court to refuse to dismiss cases on technical points, we hereby deny the motion and order the case heard on its merits at the next term of this Court; and it is hereby so ordered.
Motion denied.

MR. JUSTICE SHANNON, dissenting.

The motion to dismiss the appeal in this case attacks the appeal bond which is worded as follows :

"Know all men by these presents : that the Oost Af rikaansche Compagnie, represented by General Manager, D. Van Ee, the above named appellant, principal and surety, being a freeholder within the Republic of Liberia is held and firmly bound unto the Sheriff of Montserrado County in the sum of one thousand two hundred ($1,200.00) dollars, to be paid to Samuel B. Gabbidon, natural guardian of his minor son, Joshua Gabbidon, plaintiff-appellee, or his legal representative, for which payment the Oost Afrikaansche Compagnie, represented by the General Manager, D. Van Ee, binds itself and its representative jointly and severally by these presents.

"The condition of this obligation is that the Company will indemnify the appellee from all costs and from all injury arising from the appeal taken by the above named appellant, and will comply with the judgment of the Court to which said appeal is taken, or any other to which said action may be removed, and will prosecute said appeal."

The above bond is only signed by D. Van Ee as appellant-principal and, notwithstanding he describes himself in the body of same as both appellant-principal and surety, he does not sign as such surety. Therefore, when the case was called for trial before us, appellee gave notice of the filing of a motion to dismiss the appeal because of alleged defects in the bond.

Because of what I consider a fatal defect in the execution of said appeal bond, and also because of the position I have taken on this bench in a unanimous opinion delivered by this Court and read by Mr. Justice Barclay in *Deady v. Republic,* 8 L.L.R. 256 (1944), and my dissent on a motion to dismiss an appeal in *Dennis v. Holder,* 10 L.L.R. 301 (1950), I have regrettably found myself unable to join my colleagues in their

conclusion to deny the motion.

Up to 1940, as far as I have been able to gather, appeal bonds were posted only by the principal and sufficient surety or sureties under the law. The sufficiency and number of sureties required differed between appeals from a justice of the peace court and those from courts of record. Because of the possible hardship this might have caused appellants who, of themselves, might be able to secure the indemnification of appellees with cash, checks, stocks, or other negotiable securities capable of being readily converted into money, or by offer of unencumbered real property held in fee by bailor, and were nevertheless unable to put up sureties with like qualifications, our Legislature in 1940 passed the following act:

"1. That from and after the passage of this Act; bail in all causes, whether civil, criminal or appeal may be given by recognizance entered into by the principal and his sureties, who may be possessed of the qualifications required by existing statutes ; or by tender of the amount required as bail in cash, checks, stocks or other negotiable securities capable of being readily converted into money, or by offer of unencumbered real property held in fee by the bailor.

"2. Upon the presentation of a bond in any cause made in a form other than by recognizance, it shall be the duty of the Judge, Justice of the Peace, Magistrate, or other officer authorized to receive bail, to approve such bond after being satisfied that such money, checks, stocks or other negotiable securities as aforesaid, are adequate and genuine, and to order same deposited into the Government depositary or some reliable bank by the Sheriff, and receipt taken for same showing amount deposited, the purpose of deposit, and that same shall be released only upon the written order of the Judge, Justice of the Peace, Magistrate or other officer authorized to receive bail, as the case may be.

"3. Any bond given as provided for in this Act, shall be considered a valid and legal bond, in any cause criminal, civil or appeal within this Republic." L. 1939-40, ch. XVIII.

It does not appear that the bond herein has met any of the requirements of the act just quoted, for it is neither a recognizance "entered into by the principal and his sureties, who may be possessed of the qualifications required by existing statutes" (the said bond only carrying the signature of D. Van Ee, as principal-appellant, without the signature of anyone as surety) nor does it make "tender of the amount required as bail in cash, checks, stocks or other negotiable securities capable of being

readily converted into money." It even fails to offer "unencumbered real property held in fee by the bailor." If such a bond is not fatally defective, then I am certainly at sea.

The argument that the Oost Afrikaansche Compagnie is able to indemnify appellee in an amount far over and above that stipulated in the appeal bond before us, for all injury said appellee may suffer as a result of the said appeal, is plausible. But, if the Oost Afrikaansche Compagnie desired to proceed without executing the usual ordinary appeal bond with sureties under the law, said company should have made a tender in cash, checks, stocks, or other negotiable securities readily convertible into money, sufficient to cover the amount of bail ; or, if so possessed, of real property unencumbered and held in fee. My dissent in *Dennis v. Holder, 10* L.L.R. 301, 311, 312 (1950) stated :

"It is a principle of law that there must be compliance with the provisions of statutes in the preparation and submission of bonds on appeal and a failure to so comply entitles the appellee to a dismissal of the appeal on motion. *Ibid.,* 3 C.J. 1106 (1915).

"There are other statutes in operation in Liberia whereby appearance bonds as well as appeal bonds are permitted to be executed, sometimes by cash securities, checks, or liens on realty; but in these cases the methods of procedure are provided. Where, however, as in this case, appellant elected to choose the ordinary procedure to executing an appeal bond, then the statutory requirements of a valid appeal bond should have been met."

I adhere to the stated principle above. If appellant intended to obviate the regular appeal bond with the required recognizance, its general manager should have not only bound himself and his successor representative of the company, but should also have made tender of some acceptable asset, to be approved by the judge in this case and subsequently ordered deposited in the government depositary, or in some reliable bank subject to withdrawal only upon the written order of the said judge. This would have been in consonance with the first and second sections of chapter XVIII of the act of 1939-40, *supra.* Since this was not done, I have no other choice but to hold that the document filed in this case as an appeal bond seriously falls short of the provisions of the statutes regulating such bonds and consequently is fatally defective. The motion to dismiss ought, therefore, to have been sustained; and I have refrained from affixing my signature to the judgment denying the motion.